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Hearings on H.R. 1084, H.R. 3369, and H.R. 1787

"Increasing Volunteers by Reducing Legal Fears"

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Testimony of Andrew F. Popper[1] Regarding H.R. 3369, H.R. 1787, and H.R. 1084

The tort reform movement has done little to strengthen laws that protect consumers from harm and even less to stimulate essential civil liability pressures that compel higher quality in the production of goods and services. While the term "reform" suggests affirmative changes that do some good, the goal of tort reform has been to limit civil litigation options, reduce exposure to civil liability, and create laws that allow defendants to calculate their exposure in advance and then breed those costs into the price of the goods or services they provide. Laws that provide no protection for consumers, no incentive for greater safety, and limit significantly the rights of those who lack power are hardly the stuff of reform.

The very premise of tort reform is flawed. On June 22, 2004, Professor Theodore Eisenberg provided testimony to this Committee in which he contended that the foundation for tort reform is specious. Professor Eisenberg summarized his remarks as follows:

> "Tort reform proposals are based on questionable views of the operation of the tort system. The United States is not the most litigious country, tort awards are not increasing, punitive damages are rare and in line with compensatory awards. . . .Estimates of tort system costs supplied to Congress and the media are deeply flawed

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[1] Professor of Law, American University, Washington College of Law. This testimony draws heavily from a draft of my article, Popper, "A One Term Tort Reform Tale: Victimizing the Vulnerable," 35 HARVARD JOURNAL ON LEGISLATION, 123 (1998). For those interested in the documentation for assertions made in this testimony, please refer to that article.

and provide no basis for sound policymaking."

I agree wholeheartedly with Professor Eisenberg's conclusions. The tort system should not be set aside in any field unless there is unequivocal evidence of its failure, of perverse incentives that outweigh the corrective justice effect of tort law. I am not aware that such evidence exists for the bills that are the subject of today's hearings, H.R. 3369, H.R. 1787, and H.R. 1084 and I oppose them.

Two preliminary comments are in order before discussing these proposals. First, firefighters, pilots who volunteer to assist those in need, and those who make charitable gifts are appropriately honored and supported. Only a fool would deny the immeasurable value of these individuals. Recognizing that volunteers are of great value is entirely different from immunizing volunteers– and their organizations– when volunteers or their organizations engage in misconduct tantamount to negligence. When one engages in acts that violate basic standards of due care, the harm they cause is not assuaged on the premise that, properly done, such acts would have been the essence of decency.

Second, while these bills target singular and narrow segments of tort liability, they represent a threat to the whole of the civil liability system. Since broad proposals such as abolishing punitive damages, strict liability, or joint and several liability have not yet succeeded, tort reformers have followed a strategy of pursuing isolated aspects of civil liability law. Biomaterials, vaccines, charities, airlines, tobacco, fast foods, and other fields are presented to be in desperate need of federally imposed limits on liability, purportedly to insure industry survival. The pattern that emerges resembles the hunting practices of a wolf pack. Rather than

taking their prey with a single bite, wolves begin with a series of bites, disabling and weakening their victims before coming in for the kill. The "bites" proposed in these bills, in isolation, may not seem all that devastating. Taken in conjunction with the stream of endless targeted tort reform attacks, they are dangerous and threaten our model of civil justice and legal accountability.

H.R. 3369, H.R. 1787, and H.R. 1084

H.R. 3369, the "Nonprofit Athletic Organization Protection Act" would give immunity to non-profit athletic organizations. The bill covers rules an organization might adopt but also seems to grant general immunity to such organizations. If passed, the bill would block anti-discrimination cases that have been used to address race, disability and gender discrimination. In addition to destroying the opportunity for an athlete to challenge discriminatory practices (while placing no limit on an organizations ability to use the courts), the bill would preempt state laws for no discernible reason.

In addition, the bill undercuts one of the stated reasons that allegedly justified the 1997 Volunteer Protection Act. During the debates regarding that law, supporters contended that while the legislation liberated coaches and volunteers from the risk of liability, even when they were negligent, it left the organizations as viable defendants in the event a plaintiff could fashion a respondeat superior theory or a general vicarious liability claim under state law. H.R. 3369, would destroy that protection.

The second bill before the committee today is H.R. 1787. This bill would give immunity

to those who donate fire fighting equipment. I am hard pressed to see why a federal bill that preempts state law is needed in this field. I don't claim to have knowledge of every tort case filed, but I do try to keep up with major areas of litigation and judicial trends. I am unaware of meaningful case law imposing liability on donors of equipment used in firefighting. I have no information regarding a shift in willingness to make donations and could not identify a single comprehensive study or professionally documented article, or other form of "evidence" (taking *Daubert* in its broadest light) to justify a federal law that would destroy the rights of an injured party to pursue a tort claim. If there is a problem in this area, I would think a waiver of liability, assuming the parties are reasonably informed of risk, would make more sense than an overly broad law that would be at odds with the most basic notions of federalism. What could be more local (i.e. subject to state law) than a fire department? If a state wants to facilitate donations (to and from fire departments) it can do so. It hardly seems a federal matter.

Finally, without putting too fine an edge on this, it is hard to see why Congress would favor a bill that removes liability from those who foreseeabily place fire-fighters at risk. It is nonsensical to protect one who knows or reasonably should know of the risk they are creating.

The third bill, H.R. 1084, if passed, protects pilots, pilot organizations, hospitals and others (including for-profit entities) involved in the transport of those who are injured or ill. As with my critique of H.R. 3369, H.R. 1084 undercuts a fundamental premise of exiting federal law, the 1997 Volunteer Protection Act. That legislation immunized negligent coaches, lawyers and doctors engaged in malpractice, and others who have trusting contact with vulnerable

populations, on the premise that victims of such misconduct would still have recourse against the organizations who sponsored the immunized defendant-volunteers. If this bill passes, that protection will vanish. Under this bill, the pilots, as well as their organizations and sponsoring entities, would all be immunized. In short, those who are in need of emergency air service and must rely on volunteers would be in the hands of individuals and organizations who are unaccountable for negligent acts.

The 1997 Volunteer Protection Act of 1997 explicitly excluded from its coverage motor vehicles and aircraft, presumably on the premise that the operation of cars, trucks, ambulances, and aircraft presented a foreseeable risk for which tort immunity was inappropriate. This bill would undo that protection.

It is troubling to think that Congress would pass a law that reduces the standard of care for pilots, particularly when they are transporting those who are in the most vulnerable condition imaginable**.**

I confess, as with the fire fighter bill, I do not know every case in the field of pilot or airline organization liability. I do follow case-law and try to observe trends– and I am unaware of litigation, appellate cases, or credible documented literature that justifies this bill.

The bills discussed above are based in part on the premise that without the risk of tort liability, more people will volunteer or make donations, and presumably, the quality and frequency of charitable work will be enhanced. Putting aside the fact that there is no meaningful study to support the claim that tort immunity would improve the number or quality of volunteers,

there is a deeper problem: these laws would eliminate the existing right to expect others to exercise due care.

The individuals who will be touched by these laws, those served by volunteers, are victims of disaster, students, patients, and countless others in need of the help, compassion, and diverse skills the volunteers can provide. This is a highly vulnerable group, often without the power to select the person who will assist them. It is worth asking why in this situation, involving those least able to "bargain" in the marketplace for assistance, one would relieve actors of the beneficial pressure of a legal system that asks them to act reasonably.

A fundamental predicate of the tort system involves the belief that the potential of liability creates accountability and improves the likelihood of enhancing the quality of goods and services. It is difficult to imagine how the removal of personal and organizational accountability advances that objective. Further, the common law has never been particularly generous to those in need of competent assistance. Outside of statutes, contracts, or certain special relationships, there is no generic duty to come to the aid of another. However, once a person has made the decision to volunteer, there must be conformity with a minimum level of due care. The bills under consideration today change that standard.

Volunteers who reach out to others are to be accorded support, respect, and encouragement. That should not mean abandoning the conventional responsibilities of due care.